

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT CINCINNATI**

KYLE FINNELL,

Petitioner, : Case No. 1:17-cv-268

- vs -

District Judge Douglas R. Cole  
Magistrate Judge Michael R. Merz

TIM SCHWEITZER, Warden,  
Lebanon Correctional Institution,

Respondent.

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**DECISION AND ORDER VACATING STAY**

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For most of the time since this case was filed, it has been stayed pending completion of Petitioner’s Motion for New Trial. (See Petitioner’s Motion to Hold in Abeyance, ECF No. 16, filed April 2, 2018; Decision and Order granting stay, ECF No. 19, June 12, 2018). On November 7, 2023, the Supreme Court of Ohio declined to exercise appellate jurisdiction over an appeal from denial of the new trial motion. *State v. Finnell*, 2023-Ohio-2563. This was the only state court proceeding of which the Magistrate Judge had been aware.

However, the Magistrate Judge recently learned from Petitioner that he had filed, earlier this year, a petition for post-conviction relief in the Hamilton County Court of . Common Pleas and an application for reopening to raise a claim of ineffective assistance of appellate counsel in the Ohio Court of Appeals for the First District. On November 14, 2023, the Magistrate Judge directed the parties to advise this Court whether they believed the stay should remain in effect pending completion of those proceedings (ECF No. 174).

Respondent advises that the stay should not be extended because “the petition is not a

mixed petition, and the warden has not raised an exhaustion defense” and the merits of those two proceedings are questionable (Response, ECF No. 178, PageID 4383).

Petitioner responds with a lengthy explanation about why a state court habeas corpus proceeding would not be an appropriate basis for a stay (ECF No. 179, PageID 4625-36). He does not seek an extension of the stay based on the pendency of his post-conviction relief petition or 26(B) proceeding.

The Magistrate Judge offers no comment on whether a pending state habeas case would be a proper basis for a stay. Nor does the Magistrate Judge offer any comment on the merits of the pending post-conviction relief petition or of the 26(B) application. It is sufficient that neither party seeks a further stay and this Court’s habeas jurisdiction is not impeded. Accordingly, the stay is VACATED.

#### **Status of the Case**

The Magistrate Judge vacated his denial of Petitioner’s Motion to Amend and agreed to reconsider that question once the Supreme Court of Ohio had completed review of the new trial proceedings. That reconsideration will be the next step in this litigation.

November 22, 2023.

*s/ Michael R. Merz*  
United States Magistrate Judge

